

1 agreements and is proprietary to the extent provided in the
2 billing agreements and applicable law.

3

4 47. Defendants admit the allegations in paragraph 51.

5

6 48. Defendants deny the allegations in paragraph 52.

7

8 49. Defendants deny the allegations in paragraphs 53
9 and 54, and deny that the plaintiffs were injured or damaged in
10 any sum, or at all.

11

12 SECOND CLAIM FOR RELIEF

13

14 50. Answering paragraph 55, Defendants reallege their
15 answers to paragraphs 1-54.

16

17 51. Defendants are without knowledge or information
18 sufficient to form a belief as to the truth of the allegations in
19 paragraph 56, and on that basis, deny those allegations.

20

21 52. Defendants deny the allegations in paragraph 57.

22

23 53. Defendants deny the allegations in paragraphs 58
24 and 59, and deny that the plaintiffs were injured or damaged in
25 any sum, or at all.

26

27

28

1 THIRD CLAIM FOR RELIEF

2

3 54. Answering paragraph 60, Defendants reallege their

4 answers to paragraphs 1-59.

5

6 55. Defendants admit the allegations in paragraph 61.

7

8 56. Defendants deny the allegations in paragraphs 62

9 and 63.

10

11 57. Defendants deny the allegations in paragraph 64,

12 and deny that the plaintiffs were injured or damaged in any sum,

13 or at all.

14

15 FOURTH CLAIM FOR RELIEF

16

17 58. Answering paragraph 65, Defendants reallege their

18 answers to paragraphs 1-64.

19

20 59. Defendants deny the allegations in paragraphs 66

21 and 67.

22

23 60. Defendants deny the allegations in paragraphs 68

24 through 70, and deny that the plaintiffs and the public were

25 injured or damaged in any sum, or at all.

1 FIFTH CLAIM FOR RELIEF

2
3 61. Answering paragraph 71, Defendants reallege their
4 answers to paragraphs 1-70.

5
6 62. Defendants deny the allegations in paragraphs 72
7 through 75.

8
9 63. Defendants deny the allegations in paragraphs 76
10 and 77, and deny that the plaintiffs and the public were injured
11 or damaged in any sum, or at all.

12
13 SIXTH CLAIM FOR RELIEF

14
15 64. Answering paragraph 78, Defendants reallege their
16 answers to paragraphs 1-77.

17
18 65. Defendants are without knowledge or information
19 sufficient to form a belief as to the truth of the allegations in
20 paragraph 79, and on that basis, deny those allegations.

21
22 66. Defendants are without knowledge or information
23 sufficient to form a belief as to the truth of the allegations in
24 paragraph 80, and on that basis, deny those allegations, except
25 Defendants admit that the information received by Pacific Bell
26 from the plaintiffs is subject to use restrictions as enunciated
27 in the billing agreements.

1 67. Defendants are without knowledge or information
2 sufficient to form a belief as to the truth of the allegations in
3 paragraph 81, and on that basis, deny those allegations.

4
5 68. Defendants are without knowledge or information
6 sufficient to form a belief as to the truth of the allegations in
7 paragraph 82, and on that basis, deny those allegations, except
8 Defendants admit that the information received by Pacific Bell
9 from the plaintiffs is subject to use restrictions as enunciated
10 in the billing agreements.

11
12 69. Defendants deny the allegations in paragraphs 83
13 and 84.

14
15 70. Defendants deny the allegations in paragraphs 85
16 and 86, and deny that the plaintiffs were injured or damaged in
17 any sum, or at all.

18
19 SEVENTH CLAIM FOR RELIEF

20
21 71. Answering paragraph 87, Defendants reallege their
22 answers to paragraphs 1-86.

23
24 72. Defendants admit the allegations in paragraphs 88
25 and 89.

1 73. Defendants deny the allegations in paragraphs 90
2 and 91.

3
4 74. Defendants deny the allegations in paragraph 92,
5 and deny that the plaintiffs were injured or damaged in any sum,
6 or at all.

7
8 EIGHTH CLAIM FOR RELIEF

9
10 75. Answering paragraph 93, Defendants reallege their
11 answers to paragraphs 1-92.

12
13 76. Defendants deny the allegations in paragraph 94.

14
15 AFFIRMATIVE DEFENSES OF DEFENDANT PACIFIC

16
17 1. As a First Affirmative Defense to each claim in
18 the plaintiffs' Complaint, Defendants allege that the Complaint
19 fails to state any claim upon which relief can be granted.

20
21 2. As a Second Affirmative Defense to each claim in
22 the plaintiffs' Complaint, Defendants allege that each of them
23 fulfilled any and all obligations imposed upon them by 47 U.S.C.
24 Section 222 and all related Sections.

25
26 3. As a Third Affirmative Defense to each claim in the
27 plaintiffs' Complaint, Defendants allege that each of them

1 performed all obligations on their part to be performed except
2 those obligations they were excused from performing, and that by
3 reason thereof, the plaintiffs are barred from any recovery from
4 Defendants.

5
6 4. As a Fourth Affirmative Defense to each claim in
7 the plaintiffs' Complaint, Defendants allege that they did not
8 improperly disclose proprietary information received or obtained
9 from or belonging to the plaintiffs.

10

11

12 5. As a Fifth Affirmative Defense to the Second and
13 Third claims in the plaintiffs' Complaint, Defendants allege that
14 no privity of contract exists between the plaintiffs and
15 Defendants Pacific Telesis Group, Pacific Bell Extras or Pacific
16 Bell Communications.

17

18 6. As a Fifth Affirmative Defense to the Fifth through
19 Eighth claims in the plaintiffs' Complaint, Defendants allege
20 that the claims are barred by the doctrine of federal preemption.

21

22 7. As a Fifth Affirmative Defense to the First claim
23 in the plaintiffs' Complaint, Defendants allege that the
24 plaintiffs are without standing to sue these Defendants.

25

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WHEREFORE, Defendants prays for judgment as follows:

- (a) Plaintiffs AT&T and MCI be awarded nothing in the above captioned action, and the action be dismissed;
- (b) Judgment be entered in favor of Defendants;
- (c) Defendants be awarded costs of this suit; and
- (d) Such other relief as the Court deems appropriate.

DATED: May 28, 1996

PACIFIC TELESIS LEGAL GROUP
BOBBY C. LAWYER
WALID S. ABDUL-RAHIM

By: 
WALID ABDUL-RAHIM

Attorneys for Defendants
PACIFIC BELL, PACIFIC TELESIS
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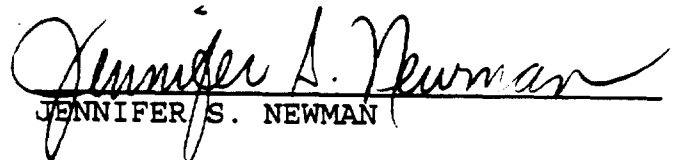
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19 I declare under penalty of perjury under the laws of the
20 United States of America that the foregoing is true and correct.

21 DATED: May 28, 1996

22 
23 JENNIFER S. NEWMAN

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION
10

11 AT&T COMMUNICATIONS OF)	<u>CONSOLIDATED ACTION</u>
CALIFORNIA, et al.,)	
12)	No. C 96-1691 SBA
Plaintiffs,)	
13)	DEFENDANTS' MEMORANDUM OF POINTS
vs.)	AND AUTHORITIES IN OPPOSITION TO
14)	PLAINTIFFS' APPLICATION FOR
PACIFIC BELL, et al.,)	<u>PRELIMINARY INJUNCTION</u>
15)	
Defendants.)	DATE: JULY 2, 1996
16)	
)	TIME: 2:00 PM
17)	
)	PLACE: COURTROOM 3
18)	[HON. SAUNDRA
19)	BROWN ARMSTRONG]
20)	
21)	
22)	
23)	
24)	
25)	
26)	
27)	
28)	

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17		PLACE: COURTROOM 3
18		[HON. SAUNDRA
19		BROWN ARMSTRONG]

20 I. INTRODUCTION AND SUMMARY

21 This is Pacific Bell's and its co-defendants' joint
22 memorandum of points and authorities in opposition to the joint
23 application of plaintiffs AT&T, Sprint and MCI, filed June 4,
24 1996, for a preliminary injunction. The two complaints
25 underlying the motion were filed on May 7. By order filed May
26 23, 1996, the Court consolidated the two actions.

27 ///

28

1 This lawsuit and the immediate preliminary injunction
2 application are about who legally owns and/or who has the right
3 to control the use of billing information on customer telephone
4 bills. The billing information at issue is each customer's
5 monthly total lump sum telephone bill, i.e., the "bottom line"
6 amount owed to Pacific Bell for monthly usage and related
7 services. The plaintiffs -- who do not compile, possess or see
8 the information, and have no automatic right to obtain it -- are
9 making groundless proprietary claims of ownership and control
10 respecting that data.

11 Billing information on customer bills is proprietary to the
12 individual telephone customers involved. The Telecommunications
13 Act of 1996 [47 U.S.C. § 222] could not be plainer to such
14 effect.

15 AT&T, MCI and Sprint have based their preliminary injunction
16 motion on the same half-cocked speculation and guesswork about
17 the facts which underlie their complaints. Just a few weeks ago,
18 the Court denied the plaintiffs' heavily-briefed motions for
19 temporary restraining orders("TRO"). A copy of one of the
20 Court's decisions, filed May 15, 1996 -- two essentially-
21 identical decisions were issued -- is submitted herewith as
22 Exhibit A. The rationale for the TRO denials is still current
23 and fully applicable to the pending preliminary injunction
24 motion. No new fact or change of circumstance has occurred
25 during the intervening weeks to enhance the plaintiffs'
26 positions.

27 ///

28

1 Indeed, in an ex parte motion for expedited discovery filed
2 after their TRO motions were denied, the plaintiffs effectively
3 acknowledged that, unless they could obtain expedited discovery,
4 they would be "... unable to fully brief" their preliminary
5 injunction motion.¹ The expedited discovery motion was not
6 granted -- notwithstanding the plaintiffs' presumptuous
7 speculation as to what discovery might or might not reveal.
8 Thus, the plaintiffs have largely just repeated their failed
9 arguments for TRO's.²

10 In addition, several statutory interpretation issues of
11 first impression under the aforementioned Telecommunications Act
12 of 1996 are present in this litigation. There appears to be no
13 applicable case law in these first few months of the new Act's
14 effectiveness. But the plain meaning of pertinent clauses in the
15 new Act strongly favors Pacific's position as to the rights of
16 ownership and/or control of the billing information in issue.

17 ¹ See Plaintiffs' Application for Expedited Discovery, filed
18 May 21, 1996, at p. 4 (lines 2-7).

19 ² In a letter to the Court dated and hand-delivered on May 15,
20 1996 -- after denial of the plaintiffs' TRO requests, but before
21 their ex parte application for emergency discovery -- AT&T asked
22 the Court to advance the July 2nd preliminary injunction hearing
23 date by three weeks to June 10. The letter request, expressly
24 made on behalf of all three plaintiffs, stated that:

25 "Plaintiffs would be prepared to file their papers before
26 May 28, 1996, the date presently set by the Court, and
27 request a hearing date, if possible, the week of June 10,
28 1996."

25 Indeed, the evidence submitted to the Court for the preliminary
26 injunction motion is no different than that submitted for their
27 unsuccessful TRO motions. The plaintiffs have merely added three
28 new declarations, one of which is practically a verbatim copy of
prior declarations, and none of which add any new substantive
information.

1 In sum, it will be shown below that there is no discernible
2 likelihood that the plaintiffs will succeed on the merits; that
3 the plaintiffs are not experiencing any harm -- irreparable or
4 otherwise; and that they have not, and cannot, show any hardships
5 warranting preliminary injunctive relief.

6
7 II. FACTS PERTAINING TO PRELIMINARY INJUNCTION MOTION

8 A. PRE-COMPLAINT FACTS

9 Pacific Bell provides local telephone exchange service
10 and multiple other telephony services within parts of California.
11 The plaintiffs -- AT&T, MCI and Sprint -- provide long distance
12 telephone service as well as other telephony services within
13 California and elsewhere, including to Pacific Bell's local
14 exchange customers. Defendant Pacific Telesis Group is Pacific
15 Bell's holding company. Defendants Pacific Bell Extras and
16 Pacific Bell Communications are wholly-owned corporate
17 subsidiaries of the holding company.

18 Recently, defendant Pacific Bell Extras introduced a
19 customer loyalty awards program.³ Any Pacific Bell customer is
20 eligible to join. Enrollment is knowing and voluntary. There
21

22 ³ The essential facts about the operations of Pacific's
23 loyalty awards program and TBR are set forth in the declarations
24 of Lynne Elizondo, executed May 10, 1996, and Jan Hewitt, also
25 executed May 10, 1996. Copies of those declarations are
26 submitted herewith as Exhibit C and Exhibit D, respectively.
27 These declarations were filed earlier in support of Pacific's
28 opposition to the plaintiffs' TRO motions. Pacific Bell has
begun to actually transfer TBR to Pacific Bell Extras, for
purposes of calculating customer awards points. That was not the
case on May 10, 1996, when the Hewitt declaration was executed.
Thus, paragraph 16 of the Hewitt declaration has become outdated
to that extent.

1 are no joining fees or monthly charges for participation.

2 The program is analogous to airline frequent flyer awards
3 programs, save for miscellaneous differences. Each month that a
4 customer spends \$50.00 or more on his or her total Pacific Bell
5 monthly bill ("total billed revenue" or "TBR"), Pacific Bell
6 Extras will award the customer 10 bonus points for all dollars
7 spent. For example, if an enrollee's total monthly bill is \$55
8 dollars, 550 bonus points will be awarded. The "TBR" is an
9 amount that appears monthly on each customer's bill as a lump sum
10 dollar figure (hereafter, the "TBR/lump sum"); it is the "bottom
11 line" amount owed to Pacific Bell for the cumulative charges --
12 local and long-distance -- on the monthly bill. By itself, the
13 TBR/lump sum provides no specific information as to the extent,
14 if any, long distance charges are included therein.

15 The ownership and use rights respecting the TBR/lump sum are
16 at the heart of the litigation and the current preliminary
17 injunction motion. Plaintiffs object to, among other things, the
18 transfer of the TBR/lump sum figures to Pacific Bell Extras for
19 use in the loyalty awards program to calculate telephone customer
20 award bonus points. The TBR/lump sums very often will include
21 long-distance charges -- but, as indicated, any such charges will
22 be lumped beyond recognition with Pacific's local service
23 charges, taxes, and charges for such additional services as
24 voice-mail, call-waiting, and the like. The long-distance
25 charges, when incurred, are billed in Pacific's regular monthly
26 bills, pursuant to Billing and Collection Agreements with the
27 plaintiffs.

28

1 Competition for local telephone service in California has
2 already begun. The new Telecommunications Act has set forth
3 procedures pursuant to which regional telephone entities will be
4 permitted by telecommunications regulators to generally compete
5 in long distance markets. This prospect of competition for
6 customers is part of the context in which AT&T, MCI and Sprint --
7 who control most of the long-distance traffic in the United
8 States by far -- filed their coordinated, mutually-supportive
9 complaints.

10

11 B. POST-COMPLAINT PROCEDURAL HISTORY

12 This is AT&T's, MCI's and Sprint's third initiative for
13 accelerated relief based on the same speculative allegations and
14 claims to ownership of customer billing information. On May 7,
15 1996, they filed for temporary restraining orders in two
16 mutually-timed lawsuits. As stated, in orders filed May 15,
17 1996, the Court denied the TRO applications (Exhibit A).

18 On May 21, 1996, they jointly moved ex parte for emergency
19 discovery. By Order filed May 28, submitted herewith as Exhibit
20 B, Magistrate Judge Maria-Elena James wholly-denied their
21 application.⁴

22

23 ⁴ Magistrate James concluded that the ex parte emergency
24 discovery application did not satisfy the Ninth Circuit's "urgent
25 need" standard for expedited discovery; that the plaintiffs'
26 alleged urgency was of plaintiffs' own making; that the
27 plaintiffs failed to explain "...how the discovery directly
pertains to the issues relevant to the preliminary injunction;"
and that "...in the balancing of the equities, the discovery
requested by plaintiffs is much too broad, too vague, and unduly
burdensome on [the defendants] at this juncture of the litigation
with no hardships weighing in plaintiffs' favor." (emphasis
added).

28

1 III. THE LEGAL STANDARD FOR PRELIMINARY INJUNCTION ADJUDICATIONS

2 In its decision denying the plaintiffs' TRO motions, the
3 Court observed that in order to grant injunctive relief the
4 moving party must demonstrate either "(1) a likelihood of success
5 on the merits and the possibility of irreparable injury, or (2)
6 the existence of serious questions going to the merits and the
7 balance of hardships tipping in [its] favor." Gilder v. PGA
8 Tour, Inc., 936 F.2d 417, 422 (9th Cir. 1991).

9
10 IV. ARGUMENT

11 A. PLAINTIFFS' WILL FAIL ON THE MERITS BECAUSE ALL OF
12 THEIR CLAIMS AND ARGUMENTS FOR A PRELIMINARY INJUNCTION
13 ARE PREMISED ON THEIR UNWARRANTED AND UNDISCUSSED
14 ASSUMPTION THAT THEY OWN AND HAVE THE LEGAL RIGHT TO
15 CONTROL THE CUSTOMER BILLING INFORMATION IN ISSUE

16 Preliminarily, it is emphasized that very little of the
17 plaintiffs' arguments are germane to the questions of whether a
18 preliminary injunction should issue. This is because the
19 plaintiffs assume answers in their favor to key questions in
20 dispute, specifically:

21 (1) Who owns the information being used in Pacific's
22 loyalty awards program?

23 and

24 2) Who is empowered to control the use of that information?

25 * * * *

26 The plaintiffs simply do not address these questions in their
27 ninety-six pages of briefs and declarations in support of their
28 latest application for accelerated relief. Rather, they simply
presume and declare their ownership of the pertinent information,

1 based on an incantatory use of the phrase "proprietary
2 information." They then bootstrap their preliminary injunction
3 arguments based on the gratuitous presumption.⁵ Similarly, the
4 plaintiffs cite a lot of cases throughout their brief for
5 boilerplate legal propositions, with which the defendants do not
6 disagree. The cases are irrelevant. They have nothing to do
7 with the applicable facts or the operative clauses of the new
8 Telecommunications Act -- which the plaintiffs seem unduly
9 reticent to discuss.

10 Hereafter set forth are several reasons why the plaintiffs'
11 assertions of ownership are simply wrong. If the plaintiffs are
12 wrong on the billing information ownership issue, the prospects
13 of their prevailing on the merits as to any claim are non-
14 existent.

15 B. PLAINTIFFS WILL FAIL ON THE MERITS BECAUSE THE 1996
16 TELECOMMUNICATIONS ACT EXPRESSLY MAKES BILLING
17 INFORMATION IN TELEPHONE CUSTOMER BILLS PROPRIETARY TO
18 THE END-USER TELEPHONE CUSTOMERS

18 Section 222(f)(1)(B) of the new Telecommunications Act
19 provides that information contained in customers' bills is

20
21 ⁵ Examples are plentiful in the plaintiffs' opening brief of
22 their assuming the key issue in dispute, i.e., the question of
23 whose information is here involved? See, e.g., p. 11 (lines 14-
24 16) ["Thus, by essentially stealing plaintiffs' information
25"]; p. 11, lines 22-24) ["While Pacific professes that it is
26 only using 'lump sum' information, which includes one element of
27 plaintiffs' proprietary information...']. To similar presumptuous
28 effect, see plaintiffs' opening brief at p. 12 (lines 6-10, 24-
25); p. 13 (lines 11-13, 18-20); p. 15 (lines 14-16, 21-22); and
26 p. 16 (lines 1-9, 10-12, 22-23). The plaintiffs base so much of
27 their brief on the assumption that they own the information that
28 they never confront the glaring statutory indicia to the contrary
[See below at pages 9-12]. Burying their heads in the sand on
that issue certainly does not suggest a genuine belief by the
plaintiffs that they will succeed on the merits.

1 proprietary to the customers. That subsection, which does not
2 appear to have been the subject of a reported judicial decision
3 to date, is entitled "Customer Proprietary Network Information."
4 (emphasis added) It states, in pertinent part:

5 [§ 222] (f) DEFINITIONS. - As used in this section:

6 (1) CUSTOMER PROPRIETARY NETWORK INFORMATION.
7 The term 'customer proprietary network
8 information' means

9 * * *

10 (B) information contained in the bills
11 pertaining to telephone exchange service or
12 telephone toll service received by a customer
13 of a carrier; (all emphasis added)

14 * * * *

15 The TBR/lump sum dollar amounts which appear on the first page of
16 customer telephone bills -- as sworn to by Pacific's declarants
17 (Exhibits C & D) -- are the only billing information being used
18 in the loyalty awards program. Pursuant to the plain meaning of
19 the above-quoted Section 222 (f) (1) (B), that information is
20 proprietary to individual telephone customers, not to the
21 corporate plaintiffs. It is both instructive and amazing that
22 the plaintiffs do not even mention Section 222(f) (1) (B) in their
23 opening memorandum of points and authorities.⁶

24 ⁶ AT&T, MCI and Sprint confine their discussion to Section
25 222(f) (1) (A), as though the above-quoted subsection 222(f) (1) (B)
26 were non-existent [See Plaintiffs' opening brief at p. v of the
27 Table of Authorities and at text page 20 (lines 13-22)].
28 According to the plaintiffs, Pacific receives long-distance
billing information from them solely because Pacific provides
billing and collection services, not because Pacific provides any
telecommunications services to long-distance customers (Id.).
But that characterization so obviously understates, and thereby
misrepresents, the technological and legal realities.

29 The plaintiffs' long distance traffic necessarily use, in
30 material part, Pacific's telecommunications services and
(continued...)

1 In addition, Pacific Bell has obtained and continues to
2 obtain the written, signed approvals of the awards-program
3 enrollees for use of the TBR/lump sum billing information to
4 determine awards bonus points. Section 222(c) of the 1996
5 Telecommunications Act -- which also here raises an issue of
6 first impression -- seems to make it plain that the customer is
7 empowered to give such approval for "Customer Proprietary Network
8 Information". That subsection provides:

9 (c) CONFIDENTIALITY OF CUSTOMER PROPRIETARY
10 NETWORK INFORMATION. -

11 (1) PRIVACY REQUIREMENTS FOR TELECOM-
12 MUNICATIONS CARRIERS. - Except as
13 required by law or with the approval of
14 the customer, a telecommunications
15 carrier that receives or obtains
16 customer proprietary network information
17 by virtue of its provision of a
18 telecommunications service shall only
19 use, disclose, or permit access to
20 individually identifiable customer
21 proprietary network information in its
22 provision of (A) the telecommunications
23 service from which such information is
24 derived, or (B) services necessary to,
25 or used in, the provision of such

19 ⁶(...continued)
20 facilities for transport and initiation or consummation of those
21 long-distance calls. A long distance call which begins or
22 terminates in the Bay Area, for example, uses Pacific's switches,
23 poles, cables and other telephony hardware and software. The
24 plaintiffs do not have their own comparable networks within
25 California. The Billing and Collection Agreements are seamlessly
26 and pervasively entwined with those technological and legal
27 realities. Moreover, as further explained below (pages 13-14)
28 only Pacific is able to suspend telephone service across its
network -- for both long-distance and local calls, if telephone
bills go unpaid. It is the ability to deny network access for
nonpayment that makes the plaintiffs' choose to bill through
Pacific. The billing and collections agreements expressly
contemplate Pacific's use of that power, whenever warranted.
Absent that ability, AT&T, MCI and Sprint would use their own
bookkeepers, computers and back-office personnel for their
billing.

1 telecommunications service, including
2 the publishing of directories.
(Emphasis added)

3 Perusal of the title and text of the just-quoted
4 Section 222(c)(1) compels the conclusion that the "Customer
5 Proprietary Network Information" category raises end-user
6 customer privacy rights and concerns -- not those of carriers --
7 and that the customer is empowered to approve a carrier's
8 disclosure of the customer billing information in issue,
9 regardless of how the information may have been obtained.
10 Pacific Bell has that approval from the customers who signed up
11 for Pacific Bell Extra's awards program. Thus, at a minimum, the
12 TBR/lump sum information can lawfully be used as freely as is
13 consistent with the customers' signed approvals. In view of the
14 plain meaning of Section 222(c)(1), the plaintiffs cannot
15 justifiably assert that they own or have the right to control use
16 of the TBR/lump sum billing information.⁷

17
18 C. PLAINTIFFS WILL FAIL ON THE MERITS BECAUSE THE BILLING
19 AND COLLECTION AGREEMENTS DO NOT PROHIBIT OR EVEN
20 ADDRESS USE OF THE TBR/LUMP SUM BILLING INFORMATION.

21 The plaintiffs argue that they will prevail on the merits
22 because Pacific allegedly has already breached the Billing and
23 Collection Agreements. (Plaintiffs Opening Brief at pages 15-17).

24
25 ⁷ Submitted herewith as Exhibit E is a complete copy of the
26 recently-enacted Section 222 of the 1996 Telecommunications Act.
27 The statute is entitled "Customer Privacy Information" (emphasis
28 added). Its title, structure and substantive themes compel the
conclusion that Section 222 primarily protects the privacy and
proprietary rights of ordinary telephone customers -- not the
narrow self-interest of long-distance carriers.

1 Indeed, the plaintiffs declare that "...it is undisputed that
2 Pacific has breached the Billing Agreements..." [Id. at p. 15
3 (lines 21-22)].

4 First, in its answers to the complaints filed May 28 and
5 otherwise, Pacific has consistently disputed the breach of
6 contract allegations -- contrary to the plaintiffs' baffling,
7 above-quoted remark. They furnish no citation for any statement
8 or inference to the contrary.

9 Second, not one word in the plaintiffs' opening brief cites
10 any specific clause in any of the Billing Agreements to support
11 the breach of contract contention. If there were anything to
12 quote or cite, surely at least one of the three plaintiffs would
13 have done so. The reality is that the Billing Agreements simply
14 do not mention the TBR/lump sum amounts. Again, the plaintiffs
15 simply presume their proprietary ownership of the information on
16 customers' bills.⁸ That presumption forms the entire basis for
17 their breach of contract argument. It is utterly frivolous for
18 the plaintiffs to argue that their breach of contract claim is
19 likely to succeed on the merits when they are unable to identify
20 with specificity any contract clause(s) on which they purportedly
21 rely.

22
23 ⁸ See Plaintiffs Opening Brief at p. 5 (line 19) through 6
24 (line 26) and p. 15 (line 3) through 17 (line 5). In one of
25 their supporting declarations, it is implied that the reasons why
26 the plaintiffs have not quoted or appended supposedly relevant
27 portions of the Billing Agreements is that they are concerned
28 about the confidentiality of the Agreements. But that did not
stop them from including the confidentiality clauses of the
Agreements in their exhibits. [See Plaintiffs' "Declaration of
Bruce Banco" ... filed May 7, 1996, at ¶ 14, which was filed in
support of the plaintiffs' TRO application.]

1 D. PLAINTIFFS WILL FAIL ON THE MERITS BECAUSE THEY ARE
2 CLAIMING TO OWN SOMETHING WHICH THEY DO NOT AND COULD
3 NOT COMPILE, AND THE CONTENT OF WHICH IS UNKNOWN TO
THEM, AND WHICH THEY HAVE NO GENERAL LEGAL RIGHT TO
OBTAIN

4 A major incongruity in AT&T's, Sprint's and MCI's assertions
5 of ownership of the billing information being used by Pacific is
6 that the plaintiffs do not even know what the TBR/lump sum dollar
7 information is, could not compile it themselves, and do not
8 possess any unilateral legal right to obtain the information.

9 Pacific Bell compiles each TBR/lump sum for each of
10 Pacific's telephone customers, which represents the cumulative
11 debt owed for multiple telephony services -- e.g., local calls,
12 long distance calls, call-waiting, service contracts, and taxes
13 thereon. There is no way that the plaintiffs even could compile
14 such cumulative information. They never have -- at any stage --
15 all of the financial components which becomes the TBR/lump sum
16 billing information. In the face of such circumstances, the
17 plaintiffs' assertions of being likely to prevail on the merits
18 of their ownership claims are arbitrary.

19
20 E. PLAINTIFFS WILL FAIL ON THE MERITS BECAUSE PACIFIC
21 PURCHASES AND THEREFORE OWNS ALL OF THE ACCOUNTS
22 RECEIVABLES OWED BY TELEPHONE CUSTOMERS FOR BOTH LOCAL
AND LONG DISTANCE CARRIER CHARGES

23 Further, the plaintiffs' prospects for prevailing on the
24 merits runs into the barrier created by Pacific's plenary
25 ownership at all times of the accounts receivables represented by
26 the TBR/lump sums. This is because Pacific purchases the
27
28